"The land under Land Grant MG. No. 1072 Lot 883 has become *wakaf* valid according to Shariah. It has been settled by the *Wakif* (settler) the late Encik Mohamed Salleh bin Perang (Dato Bentera Luar, Johore) on his children Encik Othman bin Mohamed Salleh and Cik Kalthum binti Mohamed Salleh and on to their children, grand children and generations in perpetuity.

This type of *wakaf* on the construction of Shariah Law is called *Wakaf Khas Ahli* (special family *wakaf*)."

I do not think it would be proper at this stage to consider the effect of the *fatua* as against the statutory provision in Enactment No. 5.

I have cursorily gone through the new Johore Enactment (No. 11/73). I can understand why it has not yet been brought into force. There are some apparent defects. In the main it gives power to the Kathi to determine whether a property is a *wakaf*, but a right of appeal against his decision is also given. The definition provisions in section 2 give the meaning "*muku alaihi*" (the person or institution for whom the property is made a *wakaf*). But there is no reference to such *wakaf* in other provisions of the enactment. "*Nazir khas*" is defined to mean a person appointed by a *wakif* or *Nazir Am* to administer a *wakaf* property. But there seems to be no provision showing the circumstances under which a *Nazir Am* can appoint a *Nazir khas*.

The question of the title of the land clearly needs to be resolved. It would be only after a hearing under section 5 of the Enactment that the court could determine whether the land should vest in the names of the beneficiaries of the *wakafs* (or their representatives) or whether the *wakafs* were invalid, thereby reverting the land to the estate of Dato Bentera Luar.

For the purpose of the caveat, the contention of the respondents is that they have a superior claim to the title to the land by reason of their being the children of the beneficiaries of the *wakaf*, whereas the applicants are not. This is not disputed at all. Pending the decision of the court as to whether the land should remain as the estate of Dato Bentera Luar or should go to the estates of Othman and Kalthum, I am of the opinion the respondents' claim is within the purview of section 323 of the National Land Code.

Application dismissed with costs.

Application dismissed.

Solicitors: *Hassan Yunus & Co.; Hassan & Ng Kong Yeam.*

PUBLIC PROSECUTOR v. ABDUL AZIZ

[R.Cr.J. (Syed Agil Barakbah J.) February 5, 1978]

[Alor Star — Kedah Criminal Revision No. 2 of 1978]

Criminal Law and Procedure — Criminal Revision — Rukun Tetangga — Failure to attend to Rukun Tetangga duties without reasonable cause — Improper charges — Plea of guilt — Failure of magistrate to record facts of the case and conviction — Trial a nullity — Emergency (Essential Powers) Ordinance, 1969, ss. 31(1)(e), 44 — Essential (Community Self-Reliance) Regulations, 1975, regs. 31(1)(e) & 44 — Criminal Procedure Code (F.M.S. Cap. 6), s. 176.

Community Self-Reliance (Rukun Tetangga) — Failure to attend to Rukun Tetangga duties without reasonable cause — Emergency (Essential Powers) Ordinance, 1969, ss. 31(1)(e), 44 — Essential (Community Self-Reliance) Regulations, 1975, regs. 31(1)(e) & 44.

The accused was charged for failing to attend Rukun Tetangga duties without reasonable cause, an offence under section 31(1)(e), punishable under section 44 of the Emergency (Essential Powers) Ordinance, 1969. He pleaded guilty to all charges and was sentenced. All that was recorded after the charges were read and explained to the accused who understood the nature of the charge and the consequences of the plea were "Facts as per charge". Thereafter was the "plea in mitigation" before the sentence. The High Court called for the record and acted in revision.

Held, setting aside the sentence on all four charges: (1) the trial was a nullity. The accused had pleaded guilty to improper charges. He should have been charged for an offence under reg. 31(1)(e) of the Essential (Community Self-Reliance) Regulations, 1975 and punishable under reg. 44 of the same Regulations;

(2) the learned magistrate had failed to record the facts of the case which he should have done on a plea of guilty. This was necessary in order to ascertain whether the accused, especially if he was not represented by counsel, had understood the charge or charges preferred against him and that he really intended to plead guilty;

(3) the learned magistrate had failed to put on record a conviction against the accused in all the four charges.

Cases referred to:-

(1) *Supramaniam* v. *Kanthasamy* [1956] M.L.J. 18.

(2) *Tukiran bin Taib* v. *Public Prosecutor* [1955] M.L.J. 24 @ 25.

(3) *Palan* v. *Public Prosecutor* [1932] M.L.J. 124.

(4) *Public Prosecutor* v. *Nahat Singh* [1939] M.L.J. 239.

(5) *Public Prosecutor* v. *Chean Tin* [1939] M.L.J. 266.

(6) *Chin Ban Keat* v. *R.* [1949] M.L.J. 297.

CRIMINAL REVISION.

Syed Agil Barakbah J.: In this case, Abdul Aziz bin Fakir Mohamed was charged in the Magistrate's Court, Alor Star with four charges for failing to attend Rukun Tetangga duties without reasonable cause, an offence under section 31(1)(e), punishable under section 44, of the Emergency (Essential Powers) Ordinance, 1969. He pleaded guilty to all the charges and was sentenced to a fine of $50/-, in default to 5 days' imprisonment and imprisonment for one week on the first three charges and to a fine of $100/- and in default to one week's imprisonment and further imprisonment for one week on the fourth charge. As the case is the first of its kind in the State, it gained headline publicity in the press. So I called for the record to ascertain the propriety of the proceeding and the sentences imposed. The accused has also filed notice of appeal.

On perusal of the record, it is found that:—

1. All the four charges preferred against the accused are incomplete and vague.

The accused should have been charged for an offence under Regulation 31(1)(e) of the *Essential (Community Self-Reliance) Regulations, 1975 and punishable under Regulation 44 of the same Regulations* and not merely under the Emergency (Essential Powers) Ordinance 1969 which vide section 2 confers powers to the Yang di-Pertuan Agong to make the said Regulations.

The accused has therefore pleaded guilty to improper charges.

2. The learned Magistrate has failed to record the facts of the case and to ascertain whether the accused person would admit to the facts had the same been recorded. All that was recorded after the charges were read and explained to the accused who understood the nature of the charge and the consequences of the plea, were "Facts as per charge". Thereafter was the "plea in mitigation" before the sentence. It has been laid down since long ago by the courts that upon a plea of guilty the Magistrate must either take evidence or a statement of the facts and record them. The purpose is to ascertain whether the accused, especially if he is not represented by counsel, in fact understood the charge or charges preferred against him and that he really intended to plead guilty. (See *Supramaniam* v. *Kanthasamy*[1]). If he admits the facts the Magistrate will then be able to accept his plea of guilty and thereafter record his findings.

In *Tukiran bin Taib* v. *Public Prosecutor*,[2] Bellamy J. in a similar case traced the authorities relating to the duty of trial Magistrates on the matter. Firstly, the requirement was laid down by the Court of Appeal as far back as 1932 in *Palan* v. *Public Prosecutor*.[3] Since that case the attention of magistrates has frequently been directed by judges to the importance of observing that practice. (See *Public Prosecutor* v. *Nahat Singh*;[4] *Public Prosecutor* v. *Chean Tin*).[5] Jobling J. in *Chin Ban Keat* v. *Rex*[6] discussed at length the procedure to be adopted. The aim of the court is to record the facts alleged by the prosecuting officer and admitted by the accused in order to satisfy itself that they constitute the offence charged. This can be satisfactorily achieved by a statement from the prosecuting officer followed by an admission by the accused. However, in cases of doubt or difficulty it may be advisable to have evidence led as to the facts. The proper course to be adopted is left to the discretion of the courts.

3. The Magistrate has failed to put on record during the trial a conviction against the accused in all the four charges. That is a mandatory requirement of the Criminal Procedure Code under section 176, which requires that in summary trials before a Magistrate, one of the particulars to be recorded on the charge sheet are the findings, i.e. of conviction or acquittal, as the case may be. Magistrates, even though new, should by now know what his duty is in this connection. I have had, in a recent criminal case, to exercise my revisionary powers in quashing the conviction and setting aside the sentence on a similar mistake made by the same Magistrate, who was later on personally advised by me to get acquainted with the elementary rules of procedure. The charges in the present case are more serious and therefore require proper attention and strict adherence to the procedural code.

I declare the whole trial a nullity and set aside the sentence on all the four charges. The matter is entirely left to the Public Prosecutor to prefer proper charges.

Trial a nullity; sentence set aside.

MAJLIS PERBANDARAN PULAU PINANG v. BOEY SIEW THAN & ORS.

[O.C.J. (Gunn Chit Tuan J.)

December 15, 1977, January 12, 16 and February 9, 1978]
[Penang — Civil Suit No. 692 of 1977]

Practice and Procedure — Public nuisance — Whether local authority can institute action for damages and injunction — Suit not brought in name of Attorney-General or with his consent — R.S.C. 1957, O. 25 r. 3 — Local Government Act, 1976, ss. 2 and 80 — Government Proceedings Ordinance, 1956, s. 8 — Specific Relief Act, 1950, s. 54 (Act 137).

Tort — Public nuisance — Government Proceedings Ordinance, 1956.

The defendants were alleged to have made structural alterations to a building and to have used it as a restaurant without the licence of the local authority. The local authority in this case brought an action for an injunction to restrain the defendants to use the premises as an eating house and for damages for nuisance. It also applied for and obtained a temporary injunction against the defendants. The defendants applied to have the temporary injunction dissolved and also applied for an order that the plaintiff's action be struck out.

Held: (1) if the alleged acts of the defendants amounted to a public nuisance then either the Attorney-General could sue in respect of the public nuisance or his prior consent in writing must have been obtained by two or more persons instituting the suit;

(2) if the plaintiffs succeeded at the trial of the action in proving the facts alleged in the statement of claim there could be no order for damages for nuisance as the acts alleged could, if proved, only amount to a public and not a private nuisance. The claim by the plaintiffs for damages for nuisance was therefore misconceived and unmaintainable;

(3) the plaintiff in this case could not sue the defendants without the prior consent in writing of the Attorney-General;

(4) the action should be dismissed with costs and the temporary injunction dissolved.

Cases referred to:-

(1) *Gouriet* v. *Union of Post Office Workers & Ors.* [1977] 3 All E.R. 70 H.L.

(2) *Soltau* v. *De Held* 2 Sim N.S. 133; 61 E.R. 291 at p. 295.

(3) *Wallasey Local Board* v. *Gracey* (1887) 36 Ch. D. 593.

(4) *Attorney-General* v. *P.Y.A. Quarries Ltd.* [1957] 1 All E.R. 894, 909 C.A.

(5) *Stafford Borough Council* v. *Elkenford Ltd.* [1977] 2 All E.R. 519, 526.

(6) *Warwickshire County Council & Ors.* v. *British Railways Board* [1969] 3 All E.R. 631, 634.

(7) *Prestatyn U.D.C.* v. *Prestatyn Raceway Ltd.* [1969] 3 All E.R. 1573, 1583.

(8) *Tottenham Urban District Council* v. *Williamson and Sons Ltd.* [1896] 2 Q.B. 353 at pp. 354, 355.

(9) *Hampshire C.C.* v. *Shonleigh Nominees Ltd.* [1970] 1 W.L.R. 865.

(10) *Solihull Metropolitan Borough Council* v. *Maxfern Ltd. & Anor.* [1977] 2 All E.R. 177.